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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 238

STATE OF OHIO EX REL.
PAULINE WADSWORTH,
Appellant,

VS.

JOHN A. ZANGERLE, AUDITOR OF CUYAHOGA COUNTY,
THE BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN
PARK DISTRICT IN CLEVELAND, ET AL.,
Appellees.

Appeal From the Supreme Court of the State of Ohio.

BRIEF FOR APPELLANT.

GEORGE D. HILE,
SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
By FREDERICK A. HENRY,
914 Williamson Building,
Cleveland, Ohio,
Attorneys for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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No. 237

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E. H. BRYANT,
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vs.

AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY,
F. A. SEIBERLING, ET AL.,
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SUBJECT INDEX.

Official Report of Opinion Below 1

Jurisdiction of this Court 2

Statement of Case 3

Specification of Assigned Errors 10

Argument:

1. The Supreme Court of Ohio erred in refusing to vacate its minority judgment entered by requirement of Section 2, Article IV of the Constitution of that State and to find such requirement inoperative as being repugnant to Section 4 of Article IV, Article VI, and the XIV Amendment of the Constitution of the United States 14

2. The Ohio Park Board Law, General Code Sections 2976-1 to 2976-10i, is repugnant to the Due Process and Equal Protection clauses of the XIV Amendment, Sec. 1, and to the guaranty concerning state government in Sec. 4, Article IV of the Federal Constitution 26

Table of Cases.

Arizona Eastern R. R. Co. v. Head, 26 Ariz. 259, syl. 4 26

Board of Education vs. Columbus, 118 Ohio St., 295, pages 296, 299, 301 to 307 ..... 7, 15, 17, 18, 21

Board of Park Commissioners v. Detroit, 28 Mich. 228 35

Bowman (Missouri) vs. Lewis, 101 U. S. 22 ..... 14, 16, 19

Campbell v. Park, 32 O. S. 544, 560 33

Chicago and Alton Railroad Co. v. Fisher, 141 Ill. 614 . 25

Cincinnati v. Roettinger, 105 O. S. 145, 154 33

City of Little Rock v. Board of Improvements, 42 Ark. 152, 160 34

Clapp v. Ely, 27 N. J. L. 555, 620-1, 622-4 26

C. W. & Z. Ry. v. Commissioners, 1 O. S. 77, 87 33

Fallbrook Irrigation District v. Bradley, 164 U. S. 112 27

Funkhouser, et al. v. Randolph, et al., 287 Ill. 94 ....26, 35

Gautier v. Ditmar, 204 N. Y. 20, 26 35

Green v. Red Cross Medical Service Company, 232 Ill. 616, at page 619 24

Green vs. The State Civil Service Commission, et al., 90 Ohio St., 252 3

Hertz vs. Woodman, 218 U. S. 205 17

The Inhabitants of the Township of Barnards v. Allen, 61 N. J. L. 228, at pages 230, *et seq.* 35

Mallett vs. North Carolina, 181 U. S. 589 .....14, 16, 19

Mays v. Cincinnati, 1 O. S. 269, 273 34

McNab vs. Board of Park Commissioners, 108 Ohio St., 497 ..... 4, 7

Mechanics etc. Bank v. Debolt, 1 O. S. 591, 600 34

Michigan Central Railroad Company v. Powers, 201 U. S. 245 31

Parks v. Board of Commissioners, 61 Fed. 436 35

Railroad Co. vs. Commissioners, 1 Ohio St., 77, at page 81 20

Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 34 L. R. A. 725, at page 732 34

Sanitary District v. Bernstein, 175 Ill. 215 25

Saunders vs. Shaw, et al., 244 U. S. 317, 320 5

Schultes v. Eberley, 82 Ala. 242 35

Shook vs. Mahoning Valley Sanitary District, 120 Ohio St., 449 (advance sheets); 166 N. E. 415 (advance sheets, No. for June 18, 1929) 2

State (Lydecker) v. Drainage etc. Commissioners, 41 N. J. L. 154, 156-7 35

State ex rel. Howe v. Des Moines, 103 Ia. 76 35

State of Montana, ex rel., v. Edwards, 42 Mont. 135 .. 35

State ex rel. Pogue vs. Groom, 91 O. S., 1, and p. 8 ... 17

State v. Toledo, 48 O. S. 112, 131, 132, 133-4 33

Truax vs. Corrigan, 257 U. S. 312, 331-5 .....14, 16

United States vs. Cruikshank, et al., 92 U. S. 542, 545 14

Vallelly v. Board of Park Commissioners, 16 N. D. 25 35

Wasson, et al. v. Commissioners, 49 Ohio St. 622 29

Waterhouse v. Public School, 8 Heisk, 857 35

Books and Statutes Cited.

15 *Corpus Juris* at pages 1026 to 1127 15

12 *C. J.* 786, note 78 17

Amendment of Article IV, Section 2, of Ohio Constitution 15

"Conservation" Amendment of 1912 to the Ohio Constitution (Art. II, Sec. 36) 27

Constitution of Ohio, Article I, Section 16 20

Ohio Constitution, Article IV, Section 2 .....4, 6, 7, 20

Warren's "The Supreme Court in United States History" at pages 124-6; also pp. 177-8 22

Appendix A.

107 Ohio Laws, Page 65:

An Act to provide for the conservation of natural resources by the creation, development and improvement of park districts, and to repeal sections 2976-1, 2976-2, 2976-3, 2976-4, 2976-5, 2976-6, 2976-7, 2976-8, 2976-9 and 2976-10 of the General Code ... 37

Section 1. [Section 2976-1.] [Park districts may be created; boundaries thereof.] 37

Section 2. [Section 2976-2.] [Application to probate judge; contents.] 37

Section 3. [Section 2976-3.] [Time of hearing; notice by publication.] 37

Section 4. [Section 2976-4.] [Evidence, argument, judgment. Territorial limits may be changed at hearing.] 8, 38

Section 5. [Section 2976-5.] [Appointment of commissioners; term, oath, bond.] 38

Section 6. [Section 2976-6.] [Board a body corporate; employment of secretary; records.] 8, 39

Section 7. [Section 2976-7.] [Powers and duties of board. Appropriation proceedings, how instituted.] 8, 9, 39

Section 8. [Section 2976-8] [Agreement with other public authorities in control and improvement.] .. 39

Section 9. [Section 2976-9.] Cost of improvement, how assessed and collected.] 40

Section 10. [Section 2976-10.] [Tax levy; power to borrow in anticipation of collection.] 8, 40

Section 11. [Section 2976-10a.] [Unexpended balances transferred and available; books, records, surveys, etc.] 41

Section 12. [Section 2976-10b.] [Funds shall be kept in depositories; county treasurer and auditor ex-officio officers; duties.] 42

Section 13. [Section 2976-10c.] [Removal of commissioners; procedure; vacancy.] 42

Section 14. [Repeals.] 43

108 Ohio Laws, Part 2, Page 1097:

An Act to amend sections 2976-1 and 2976-7 of the General Code and to supplement section 2976-10c of the General Code by the enactment of sections 2976-10d, 2976-10e, 2976-10f, 2976-10g, 2976-10h and 2976-10i relating to park districts and providing for the annexation of territory thereto, for the sale of lands for the levying of taxes, for the issue of bonds and conferring certain police powers upon boards of park commissioners 44

Sec. 2976-1. [Park districts may be created to encourage forestry, etc.] 28, 44

Sec. 2976-7. [Acquisition of addition of lands, lakes, streams, etc.] 28, 44

[Appropriation proceedings] 45

Sec. 2976-10d. [Annexation of adjacent or contiguous territory; procedure.] 9, 45

Sec. 2976-10e. [Powers of budget commissioners in relation to districts.] 45

Sec. 2976-10f. [Sale or lease of lands not needed; notice.] 46

[Approval of probate court.] 46

Sec. 2976-10g. [By-laws, rules and regulations; violation of, a misdemeanor; penalty.] 9, 46

Sec. 2976-10h. [Powers of employes; oath.] 9, 47

Sec. 2976-10i. [Tax levy for use of district; submission of question.] [Issue of bonds.] 47

Section 2. That said original sections 2976-1 and 2976-7 of the General Code be, and the same are hereby repealed 48

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BRIEF FOR APPELLANT.

OFFICIAL REPORT OF OPINION BELOW.

The official report of the opinion of the Supreme Court of Ohio will be found in 120 Ohio St., 464, (advance sheets, subject to change in pagination when complete volume is issued); 166 N. E. 407 (advance sheets, No. for June 18, 1929,) and is entitled the *State ex rel. Bryant vs. Akron Metropolitan Park District for Summit County, et al.,* the *State ex rel. Wadsworth, a Taxpayer, vs. Zangerle, Auditor, et al.,* Nos. 21324 and 21336, decided March 27, 1929, and printed in the Ohio State Bar Association Reports, Volume II, No. 11, for June 11, 1929; also in the Law Bulletin and Reporter, Volume XXIX, Number for June 17, 1929, page

277. In each of these local law weeklies appears also the report of the same court's decision in *Shook vs. Mahoning Valley Sanitary District,* 120 Ohio St., 449 (advance sheets); 166 N. E. 415 (advance sheets, No. for June 18, 1929), which was decided at the same time and involves similar constitutional questions. The opinion of the Supreme Court of Ohio in the present case appears also in the printed transcript of record at pages 13 to 32.

JURISDICTION OF THIS COURT.

Paragraph 1 of Rule 12 having already been complied with by the filing of "Appellant's Statement of Basis of Jurisdiction of this Court," which was unopposed and upon which the question of jurisdiction was submitted on October 14, and the jurisdiction sustained on October 28, 1929, a repetition here of the contents of said statement is dispensed with under Rule 27.

STATEMENT OF CASE.

The material facts in respect to the subject matter and history of this case, with references to the printed record, are set out below.

This is one of two parallel cases (see No. 237, *State of Ohio ex rel. E. H. Bryant, Appellant, vs. Akron Metropolitan Park District, et al.*) which are here on appeal from the Supreme Court of Ohio. Both appellants were plaintiffs in the Common Pleas Courts. In the Courts of Appeals, the appellant in No. 237 was plaintiff in error, and in the present case, No. 238, the appellant here was appellant there. In the Supreme Court of Ohio, each was plaintiff in error. In each case the relator, a taxpayer, sued in the Court of Common Pleas of the proper county for an injunction on constitutional grounds, both State and Federal, to enjoin the Park Board of the (Cleveland or Akron)

Metropolitan Park District, together with the auditor of the county where such Board's revenues and disbursements are handled, from making further expenditures of public money, from incurring any obligation requiring such expenditures, and from the taking of other official action in behalf of the district (*i. e.*, the Akron Metropolitan Park District for Summit County in No. 237, and the Metropolitan Park District in Cleveland, Cuyahoga County, in the instant case, No. 238); for a decree declaring the Ohio Park District Act unconstitutional; and for other specific and general equitable relief. In Ohio it is settled by *Green vs. The State Civil Service Commission, et al.*, 90 Ohio St., 252, that a taxpayer may maintain such an action for injunction against a public commission, board or officer.

Both Districts were organized under the Ohio Park District Act, General Code Sections 2976-1 *et seq.* The original act, with amendments, is herein set out in Appendix A. The Cleveland District originally comprised all of Cuyahoga County except Bay Village (R. 44); but with subsequent annexations it now (R. 44, 54) embraces the whole of Cuyahoga County together with the Township of Hinckley in Medina County (R. 42), and it has furthermore acquired and holds land in Lake County which is not annexed to but lies outside of the District (R. 42, 54). The Akron District comprises all of Summit County except the Township of Twinsburg and the Village of Hudson.

The mode of organization of park districts prescribed by the Act contemplates the presentation to the probate judge of a freeholder's petition for and a map of the proposed district, indicating the name and boundaries thereof, which district shall not divide any township or municipal corporation. After notice and hearing, such judge shall, with or without diminishing or altering, but without enlarging, the suggested boundaries, enter an order creating such district, provided he shall find the proceed-

ings regular and that "the creation of such district will be conducive of the general welfare"; and shall then appoint three park commissioners, who are empowered by the Act to levy taxes, define misdemeanors, appoint police officers, etc. In each of these cases such characteristic features of the Park Board Laws are charged to contravene the Constitutions both of Ohio and of the United States,—the federal aspects of such averments in the present case, No. 238, being cited and discussed below.

The lower state courts decided both cases for the defendants, but in each the Ohio Supreme Court divided, two for and five against the constitutionality of the Act (R. 7). Under the peculiar provisions of Section 2 of Article IV of the Ohio Constitution, hereinafter quoted, the minority opinion controlled the court's decision whereby the judgments of the lower courts in both cases were affirmed. As explained below, the decisions of the lower courts upon the constitutional questions were themselves controlled under the rule of *stare decisis* by the prior decision of the Ohio Supreme Court in *McNab vs. Board of Park Commissioners,* 108 Ohio St., 497, the syllabus of which (as being officially declaratory in Ohio of the adjudicated law) did not stop with passing upon the particular constitutional questions presented and considered therein, but upheld generally the constitutionality of this Park Board Act.

The present case, No. 238, was appealed (R. 36) from the Common Pleas Court of Cuyahoga County to the Court of Appeals, where a trial *de novo* resulted in "Findings of Fact" (R. 53-58), along with which (R. 58, 59),

> "for Conclusions of Law, the court finds, upon the issues joined, for the defendants; that the said Sections 2976-1 to 2976-i of the General Code of Ohio, are in all respects valid and not in violation of the Constitution of Ohio or the Constitution of the United States or any provision thereof, and that the proceedings had by the

> defendants are in all respects legal and valid, and judgment dismissing the plaintiff in error's amended petition is entered"—

which is the judgment affirmed by the Ohio Supreme Court. The cause was taken thither by petition in error, alleging *inter alia* (R. 33):

> "2. That the court erroneously decided the constitutional questions involved adversely to this plaintiff in error."

There, on intimation to counsel for the Park Board during argument, the constitutional questions were further briefed, and *amici curiae* having also filed briefs on each side (R. 6), the court *sua sponte* ordered a reargument, after which the judgment of the Court of Appeals was finally affirmed (R. 6); but the affirmance being qualified by the disclosure that a majority comprising five of the seven judges considered the Act to be unconstitutional (R. 7), this appellant filed an application for a rehearing, which the court denied (R. 6, 7), and also filed and the court overruled (R. 6, 7) a motion to vacate the judgment and for judgment for plaintiff in error (R. 8-12), alleging *inter alia*, besides the previously urged constitutional objections (R. 39-44) to the Park Board statutes as hereinafter discussed, a further constitutional objection then and not until then arising or available, (*cf. Saunders vs. Shaw, et al.*, 244 U. S. 317, 320), viz., that the affirmance with such majority dissent (together with the provision of Article IV, Section 2 of the Ohio Constitution purporting to warrant such procedure in some but not in all cases of such division of opinion) itself violates various paramount provisions in the Constitutions both of Ohio and of the United States (R. 12); namely, as to the latter, the Equality Clause of Section 1 of the Fourteenth Amendment (R. 12), the guaranty of republican state government in Section 4 of Article IV (R. 12), and the mandate within and concerning the

instrument itself (Article VI) that it is the supreme law of the land (R. 12) and that the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Appellant's motion to vacate concluded by alleging accordingly that this recital of constitutional objections to the entering of such minority judgment sustaining the Park Board Act solely by force of said Section 2 of Article IV of the Ohio Constitution, with its capricious and unequal operation, its arbitrary and unrepublican rule of adjudication, and its silencing of the majority judges concerning the Constitution whose supremacy they are bound by its terms to declare (R. 12),

> "applies not only to the determining of the repugnance of the Act to the Ohio Constitution, but *a fortiori* to the testing of such act under the Constitution of the United States which may and must be adjudicated by a majority of this Court."

That provision of the Ohio Constitution, Article IV, Section 2, which is here referred to, is as follows:

> "No law shall be held unconstitutional and void by the supreme court without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

The procedural history of the *Akron* case, No. 237, is the same as that of the instant case, No. 238, save that in the former the Common Pleas judgment was rendered upon the pleadings and not, as in the Cleveland case, after full trial of issues of fact in respect to alleged maladministration by the Board itself; and the review in the Court of Appeals was by proceeding in error and not, as in No. 238, by appeal and trial *de novo*. In each case, in so far as the constitutional issues were concerned, the judges of the lower state courts, following the above cited previous decision of

the Ohio Supreme Court in *McNab vs. Board of Park Commissioners,* (108 O. S. 497) and therefore declaring the Park Board Act to be constitutional under the rule of *stare decisis,* could, of course, give no effect to opposing views. This in turn arbitrarily and by mere chance subjected the dissenting majority of the judges of the State Supreme Court to the distinct and different but equally compelling restraint which the Court of Appeals' judgment, sustaining the law, imposed upon their freedom of decision under the above quoted provision of the State Constitution (Article IV, Section 2). Thus, the prior action of either court appears to have constrained the action of the other. But as to the original basis of this dilemma, the opinion by Marshall, *C.J.,* expressing the views of the prevailing minority of the Supreme Court (and in this respect of the majority also), concedes that its earlier decision in *McNab vs. Board of Park Commissioners,* cited *supra,* broad as was its affirmation of the constitutionality of the Park Board Law, should not be treated as conclusive of these suits in view of the new constitutional questions therein first presented; for he says (R. 19):

> "While the syllabus in that case was a sweeping declaration of the constitutionality of the statutes which are challenged in the instant case, it is proper to state that a different angle of attack is here made."

The arbitrary results of the operation of Section 2 of Article IV of the Ohio Constitution in making those statute laws of a general nature (which are required by Section 26 of Article II to be of uniform operation throughout the state,) constitutional and valid in some appellate districts, unconstitutional and void in other appellate districts, and of uncertain operation in all other parts of the State of Ohio, are set forth in *Board of Education vs. Columbus,* 118 Ohio St., 295, at pages 301 to 307, and are hereinafter discussed.

In addition to the constitutional question above outlined which arises out of the minority judgment rendered by the Ohio Supreme Court, and in particularizing the general averment of unconstitutionality of the original and amendatory acts comprising the Park Board Law (R. 43), "all of which provisions violate the provisions of the constitutions herein set forth" both State and Federal, the amended petition herein specially raises Federal questions (R. 40-44) on six salient features of said law which are deemed repugnant to various sections of the Federal Constitution, including *inter alia* the Due Process (R. 40) and the Equality (R. 44) Clauses of the Fourteenth Amendment, and which may be summarized as follows, viz.:

1. Section 4 (107 Ohio Laws 65; General Code Section 2976-4) empowering the probate judge to *mold* the confines of the territory of the proposed district as petitioned for and to erect the same into a park district, "if he finds the creation of such district will be conducive to the *general welfare.*"

2. Sections 5 and 6 (107 Ohio Laws 66; G. C. 2976-5 and 2976-6) providing for the *appointment* by such judge of three persons—whose qualifications are not prescribed—to constitute the board of commissioners of such park district, as a body corporate and politic;

3. Section 7 (107 Ohio Laws 66; G. C. 2976-7) authorizing said board to appropriate lands within and without said district;

4. Sections 10 and 10i (107 Ohio Laws 67; G. C. 2976-10; and 108 Ohio Laws, Part 2, 1099) authorizing such appointed board to *levy taxes* on both real and personal property up to one-tenth mill annually without popular vote; an additional one-tenth mill annually through such period of years as the electors may authorize; and such further one-tenth mill annual levies to continue over periods of years as may be so voted at not less than yearly intervals;

5. Sections 10g and 10h (108 Ohio Laws, Part 2, 1098; G. C. 2976, 10g; and 108 Ohio Laws, Part 2, 1099; G. C. 2976, 10g) enabling such appointed board to make by-laws, rules and regulations, the violation of which shall be *misdemeanors*, and to clothe its designated employees with "all the powers of *police* officers within and *adjacent* to the lands under the control and jurisdiction of the board";

6. Sections 7 and 10d (107 Ohio Laws 66; G. C. 2976-7; and 108 Ohio Laws, Part 2, 1098; G. C. 2976-10d) authorizing the probate judge to make *annexations* to the district of lands within or *without the county* of its origin, and thus to extend over such annexed territory the exercise of the aforesaid powers therein, including the park board's acquisition by appropriation or otherwise, and the developing, improving and policing of lands *outside* of such district and within or without such county, at the cost and expense of the taxpayers *within* the district, and "in such manner as the commissioners may deem conducive to the general welfare."

Other inequalities in the operation of the Park Board Law result, if, as has occurred, a large part of the land in any existing township, school district, or other taxing subdivision, is acquired by the Board and thereby becomes exempt from taxation so as to overburden the residue; or if the budget commissioners of different counties into which a park district extends, reduce in varying degrees the rate of its unvoted tax levy.

Specifically the amended petition herein avers, in regard to the authority of the probate judge of Cuyahoga County to organize the Board of Park Commissioners of the Metropolitan Park District in Cleveland, that (R. 40) no "order or decree can be entered by said court that is valid under the due process of law provided in Section 1, Article XIV of the Constitution of the United States and

the fundamental law of Ohio," because, (a), the Park Board Law purports to authorize such judge to fix the confines of the district, whereas "the determination of what the geographical boundaries of a territory shall be is a political or legislative question, which cannot be delegated to the judiciary by the General Assembly"; (b), the Park Board Law purports to authorize such judge to appoint three commissioners empowered by the Act "to levy real and personal property taxes in an amount not in excess of one-tenth (1/10) of a mill upon each dollar of the assessed value of the property in the district in any one year" (R. 40); (c), said law provides for the "delegation to said defendants, Park Board Commissioners, of the power to enact penal measures, and exercise police powers and clothe all their employees with powers of police officers" (R. 42); and (d), because "said law cannot have uniform operation throughout the state, in violation of Section 26 of Article II of the Constitution of Ohio"; and the plaintiff and those whom she represents are, therefore, "denied the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution" (R. 44).

SPECIFICATION OF ASSIGNED ERRORS.

In appellant's "Assignment of Errors" (R. 4, 5), and in the specification thereof contained in the "Statement of Points to be Relied on" (R. 59-61), the first and second errors of the Supreme Court of Ohio complained of are in finding and deciding (R. 4)—

> "1. That, 'it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, JJ.) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall, C. J. and Kinkade, J.) are of the opinion that said sections are not repugnant to any constitutional

provision; that the Court of Appeals held the said statutes constitutional and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed.'

"2. That said provision of Article IV, Section 2 of the Constitution of Ohio, directing that 'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void,' does not violate Article XIV, Section 1 of the Constitution of the United States, nor operate in said State of Ohio to 'deny to any person within its jurisdiction the equal protection of the laws.' "

The two errors thus assigned—mention of the third and last one being deferred until later—are further specified in the "Statement of Points," filed in this Court as follows (R. 59, 60):

"Point One. The Park District Act (General Code of Ohio, Sections 2976-4 *et seq.*) was held by the Common Pleas Court and the Court of Appeals of that state not to violate either the Constitution of the United States or that of Ohio; but on error to the Supreme Court of Ohio only two of the judges were of that opinion and five of the judges were of the opinion that said statute is unconstitutional and void; nevertheless an order of affirmance was entered because of the provision of Article IV, Section 2 of the Constitution of Ohio, that 'No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void'; and on motion to vacate this judgment and substitute a judgment of reversal pursuant to the opinion of the ma-

jority of the judges on the ground that this constitutional limitation does not operate where the statute in question is claimed to be contrary to the Constitution of the United States, inasmuch as by Article IV of that instrument it is declared to be 'the supreme law of the land' and that 'the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding,' the Supreme Court of Ohio erred in refusing so to do.

"Point Two. This peculiarity in the judicial structure of the State of Ohio as illustrated in *Board of Education vs. Columbus,* 118 O. S. 295, 296, 306 and especially 298, may make a statute of the state valid in some parts of the state and invalid in other parts—not because such is the asserted will of the legislature in enacting such statute, nor because the act, though general in form, is in the nature of the case confined in its operation to a limited area or to a definable class of persons or things—but solely from the lottery of discordant inferior court decisions on a particular constitutional question which the state Supreme Court has express jurisdiction to review and yet can not bring into accord because, whenever two of the seven judges hold such statute to be valid, the judgments of all the different courts of appeals throughout the state, whether pro or con, upon this question may be affirmed; and this necessarily denies to litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution and by Section 4 of Article IV of the same instrument which assures to each state a republican form of government."

The third and last assignment of error is that the Supreme Court of Ohio erred in finding and deciding (R. 4, 5)—

"3. That the 'Park District Act' of the State of Ohio, General Code Sections 2976-1 to 2976-10c, inclusive (107 Ohio Laws, pages 65-69) and the amendments thereto, Sections 2976-1 to 2976-7, and the supple-

mental Sections 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097-1100), in every part thereof, is a valid law, and that none of said sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i, is unconstitutional; that neither said act nor any of said sections violates Article XIV, Section 1 of the amendments to the Constitution of the United States, nor operates in said State of Ohio to abridge the privileges or immunities of citizens of the United States or of the several states, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and that neither said act nor any of said sections, by delegating legislative power or by vesting the taxing or other legislative power in non-elective officials, violates Article IV, Sections 2 and 4 of the Constitution of the United States, nor conflicts with the guaranty of a republican form of government for said state."

This third assigned error is further specified in the "Statement of Points," as follows (R. 60, 61):

"Point Three. On the merits of the constitutionality of the Park Board Act the judgment of the Supreme Court of Ohio denies the appellant the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment, in the unequal operation of the Act in subjecting the taxpayers within the district to the financial burden of acquiring and maintaining park lands outside of it; and furthermore denies the appellant the equal protection of the laws, and due process of law under said amendment and the benefit of the republican form of government guaranteed to each state by Section 4 of Article IV in delegating to non-elective park commissioners the legislative powers of levying taxes, defining misdemeanors, appointing police officers with power to arrest, and expending tax revenues for such purposes."

ARGUMENT.

1. The Supreme Court of Ohio erred in refusing to vacate its minority judgment entered by requirement of Section 2, Article IV of the Constitution of that State and to find such requirement inoperative as being repugnant to Section 4 of Article IV, Article VI, and the XIV Amendment of the Constitution of the United States.

It is, of course, well settled that the equal protection of the laws is not denied by any diversity in the jurisdiction of the several courts of a state as to subject matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases and under like circumstances to resort to them for redress. *Bowman (Missouri) vs. Lewis,* 101 U. S. 22; *Mallett vs. North Carolina,* 181 U. S. 589. But assuming that the constitution or laws of a state may vary the remedies afforded by its courts at the discretion of the law-making power, and may even take away their right to administer generally certain kinds of remedies, the Equality Clause forbids that the state shall deny such relief to one person while granting it to another under like circumstances and in the same territorial jurisdiction. *Truax vs. Corrigan,* 257 U. S. 312, 331-5. The equality of rights is also a principle of republicanism, and although in the maintenance of such form of government the duty was originally assumed by the states where it still remains, the obligation rests upon the United States to see that the states do not deny that right. *United States vs. Cruikshank, et al.,* 92 U. S. 542, 545; U. S. Const., Art. 4, §4. Such Federal supervision is exercisable by Congress in the admission of new states. Thereafter a state enjoys wide discretion to vary in detail its frame of government. But where the innovation is contrived or necessarily operates to destroy or impair the fundamental rights of persons

within the state's jurisdiction, this guaranty, overlapped and supplemented as it is by the Due Process and Equal Protection clauses of the Fourteenth Amendment, contributes with them to form the bulwark of our liberties.

No feature of the general framework of state government throughout the United States is more constant or characteristic than the provision made in every constitution for a single reviewing court at the apex of the state's judicial structure. (See the summary of such provisions set forth in 15 *Corpus Juris* at pages 1026 to 1127.) The invaluable function of such a tribunal is to secure the unity of the unwritten law of the state and uniformity in the judicial construction of its written law. To accomplish this end without congestion, the right of review in the state supreme court is generally restricted in various ways. Perhaps the commonest mode is to refuse, or to regulate and limit, resort thereto as of right except when a constitutional question is involved or a question on which coordinate lower courts have created conflicting precedents. The revision of the Constitution of Ohio in 1912 embodied measures of this kind for the relief of the Supreme Court, but disclosed at the same time a jealous distrust of one of its main reasons for being. That Court's power to declare a law unconstitutional contrary to the judgment of the next lower court was heavily handicapped through the device of a virtual veto exercisable by a small and shifting minority of its members.

As often happens unexpectedly from a slight interference with any natural order, startling and baleful results have ensued upon this change. Uniformity of construction and consequent operation of the written law no longer prevails throughout the State of Ohio. (See *Board of Education vs. Columbus*, 118 O. S. 295, cited *supra*, and discussed below.) By force of this amendment of Article IV, Section 2, of its Constitution, that State thus denies to

those within its jurisdiction the equal protection of the laws. Such inequality is no mere incident to the normal working of a generally established system, such as judgments of affirmance consequent upon an equal division of the judges sitting. It is due rather to a deliberate experiment with an unprecedented and impracticable departure from the type of judicature which obtains in all the states of the Union with but one other exception, and which is an outstanding and durable feature of the republican form of government enjoined upon the states and guaranteed to their inhabitants.

It will be argued that the logic of this contention would require not only that every state must provide a single court of last resort, as each in fact has ever done, but also that every litigant shall have access thereto for a review of his cause, as few, if any, states now unrestrictedly permit. The answer to this objection is found in the principles of classification which are defined and limited in the three decisions of this Court above cited, viz., *Bowman (Missouri) vs. Lewis, Mallett vs. North Carolina,* and *Truax vs. Corrigan.* The Federal Constitution does not require statewide uniformity of state laws or of prescribed or permitted judicial procedure, nor forbid the adaptation thereof to diverse conditions and places. But it does demand that any classification of laws or procedure for different parts of the state, or to meet varying conditions in all parts of the state, shall have a reasonable basis and shall not be fitful or fortuitous in its application or operation. If by provision in a state constitution a supreme court is created and made accessible to litigants, its jurisdiction cannot lawfully be so molded, under pretense of classification, as to promote or probably produce contrariety of decision of identical questions. A bench may indeed change its mind, but so long as it remains of the same mind it ought not to be obliged to render contradictory judgments in respect to

the construction and application of one and the same law. Classification, moreover, is a legislative function; but in Ohio, without any exercise thereof by the General Assembly, a statute enacted by it becomes, by inconsistent adjudication under this constitutional constraint, law in one district, no-law in another, and uncertain law in the rest, with haphazard and chaotic heed paid here to the legislative will and there to applicable constitutional limitations.

Though not all this has yet happened to the Park Board Law, the minority judgment in the present case was in fact the direct result of this vice in the Ohio Constitution. Such result is peculiarly flagrant because, as explained above in the Statement, the controlling decision below by the Court of Appeals was itself determined by a prior decision of the Supreme Court, the official syllabus of which the latter Court now concedes to have been too sweeping. And the majority view of the Ohio Supreme Court now—henceforth a license and invitation for the lower courts to follow (*Board of Education vs. Columbus, supra,* citing at pp. 299-301, *Hertz vs. Woodman,* 218 U. S. 205,)—will next time become its effectual judgment. The appellant here is clearly and substantially aggrieved; the contention now presented was seasonably urged below; it is immaterial that there is as yet no conflict of decision in respect to this Act; and the proposition of law embraced in the point now argued is justiciable and not moot or premature. *State ex rel. Pogue vs. Groom,* 91 O. S., 1, and p. 8 of the opinion by Donahue, J., (afterwards a judge of the U. S. C. C., 6th Circ.); 12 C. J. 786, note 78.

The anomaly of this provision of the Constitution of Ohio, which defeats the majority opinions of the judges of its Supreme Court, as well as the flagrant inequality of its operation, will best be explained by quoting excerpts from the opinion in *Board of Education vs. Columbus,* 118 Ohio St., 295 (cited *supra*), wherein that Court for the second

time passed upon the constitutionality of Section 3963 of the General Code of that State, requiring that "no charge shall be made by a city or village, or by the water works department thereof, for supplying water for * * * the use of the public school buildings in such city or village." In the opinion by Marshall, *C.J.*, (who delivered the prevailing minority opinion in the present case, and with whom then as now Kinkade, *J.*, concurred,) he says, at page 296:

> "The controversy is in every essential detail identical with the case of *City of East Cleveland vs. Board of Education of City School District of East Cleveland*, 112 Ohio St., 607, 148 N. E., 350, decided May 26, 1925. There has been no change in the personnel of this court since that decision. That decision was rendered by two members of this court; the other five judges dissenting. Two judges were able to render a judgment under authority of a provision in Section 2 of Article IV of the Ohio Constitution, which provides:
>
> " 'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void.' "

Again at page 306 the Chief Justice further says that

> "a cause originating in the probate court might involve the constitutionality of a statute, and the statute might be declared unconstitutional by the probate court, the Common Pleas Court on error, and by one of the judges of the Court of Appeals, and by five judges of the Supreme Court, a total of eight judges, and yet the statute would be held to be constitutional by the concurrence of two judges of the Court of Appeals, declaring its constitutionality, and affirmed by two judges of the Supreme Court, a total of four."

The unequal operation of the laws of the State of Ohio in the application of this provision of the Constitution of Ohio is clearly disclosed at page 298 of the opinion:

"It has always been recognized as a sound theory that the most important function of courts of last resort is to render uniform the conflicting decisions of inferior tribunals within the jurisdiction of such courts, but the practical operation of this theory is destroyed in the State of Ohio, so far as the constitutionality of statutes and ordinances is concerned, by the constitutional provisions above referred to. The best possible illustration of that fact is found in the decision of the instant case and the decision of the *East Cleveland* case. In the Second Appellate District, Section 3963 is unconstitutional and void, and must be so treated by all the municipalities of that district. In the Eighth and Ninth Appellate Districts the statute is valid, and must be so administered. In the other six appellate districts, municipalities may not know whether that section is valid and applicable to municipalities within their jurisdictions until the question has been submitted to the various Courts of Appeals of those districts, but all municipalities in those districts may be assured that whatever judgments are rendered by their respective Courts of Appeals will be affirmed by this court until such time as either the constitutional provision is abrogated or changes occur in the personnel of this court. It would be difficult to describe or even imagine a more deplorable situation."

We respectfully request this Court to read the entire opinion in the above case.

The rule of *Missouri vs. Lewis, supra,* and of *Mallett vs. North Carolina, supra,* is to be distinguished from the principle applicable to the present case, in that the diversity of provisions for judicial review in different parts of a state may presumably be warranted by the existence of a basis of reasonable geographical classification. Here, however, there is neither geographical nor other legitimate ground of classification to sustain the eccentric and irrational operation of Section 2 of Article IV of the Ohio Constitution.

Certainly the determination of the Federal as distinguished from the State Constitutional questions concerning the validity of the Park Board Law by a minority vote of the members of the Supreme Court of Ohio, pursuant to said section, brings such section into direct conflict with Article VI of the Federal Constitution which provides that that instrument and the treaties and laws made under it are the supreme law of the land, and commands that "the *judges* of every state shall be bound thereby, anything in the *constitution* or laws of any state to the contrary notwithstanding." Fortunately this Court can independently reconsider those questions. Not generally so, however, of questions arising under the State Constitution alone. Of these the State Supreme Court is, in general, and when permitted to function effectively, the final arbiter. But since that tribunal's discharge of this function is controlled by the minority-rule limitation in the State Constitution, such limitation, being incompatible with the Equal Protection Clause, must give way and the judgment below be reversed.

In *Railroad Co. vs. Commissioners,* 1 Ohio St., 77, at page 81 it is said:

> "that it is the right, and consequently the duty, of the judicial tribunals to determine whether a legislative act drawn in question in a suit pending before them is opposed to the Constitution of the United States or of this State, and if so found, to treat it as a nullity."

It is also provided in the Constitution of Ohio, Article I, Section 16, that

> "all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of the law and justice administered without denial or delay."

And in Section 2 of Article IV, it is provided that the Supreme Court of Ohio

> "shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and

appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state * * *."

Such provisions must either wholly nullify, or else yield to, the later clause in the same Section 2 that is here complained of. Thus the enforcement of the latter defeats Section 26 of Article II, which requires that "all laws of a general nature shall have a uniform operation throughout the State." These self-contradictions in the Ohio Constitution are exemplified and discussed in *Board of Education v. Columbus, supra,* wherein the Court concludes that it is itself impotent to correct them against the adverse vote of any two of its members.

But assuming that all these irreconcilable provisions are alike binding upon all the judges of that Court, the mischief-making limitation is the one that should yield. If a key to the deadlock can not be found in the State Constitution, one lies at hand in that of the United States. This solution was duly invoked in the court below, and it erred in failing to enforce, by majority rule, the protection claimed under that instrument—by which "the judges in every state shall be bound," "anything in the Constitution or laws of any state to the contrary notwithstanding,"—and in failing to hold void this clause in the Constitution of Ohio, which is not only the negation of due process and a denial of equal protection, but when engrafted on the frame of any government is destructive of its republican form.

A striking parallel to such application of these basic limitations on the power of a state thus to hobble its supreme judges is found in the commentary of a learned historian of this Court upon an abortive proposal of the same device a century ago to paralyze Your Honors' power to declare state laws repugnant to the Federal Constitution. In the decade 1823 to 1833 while Congress was debating various measures to restrict or nullify the power of the

United States Supreme Court to hold a state law repugnant to the Federal Constitution, one of the means to that end, proposed in 1824 and again in 1829, is described in Warren's "The Supreme Court in United States History" at pages 124-6 (and see also pp. 177-8) as follows, including footnotes:

> "Since many persons in the country believed that strong arguments could be made in behalf of such a measure, a bill was reported from the Committee on Judiciary by Senator Martin Van Buren of New York, on March 11, 1824, providing that no law of any of the States should be rendered invalid without the concurrence of five of the seven Judges. The bill, however, was laid upon the table. In the House, similar measures were proposed by Robert P. Letcher and Thomas Metcalfe, both of Kentucky. That this reform in the Judiciary system seemed, superficially, to have much to commend it is seen from the fact that Webster wrote to Judge Story, informing him that Judge Todd had told him it would give great satisfaction in the West, and asking him if he saw any evil in such a provision. Later, however, Webster decided to oppose the change, although he was willing to go so far as to offer a substitute to provide that, in cases involving the validity of a State statute or Constitution, 'no judgment shall be pronounced or rendered until a majority of all the Justices of the said Court legally competent to sit in the cause shall concur in the opinion, either in favor of or against the validity thereof, and until such concurrence such suit shall be continued.' There were two very vital objections to this requirement of a concurrence of five of the seven Judges, which seem to have been entirely overlooked in the debate. In the first place, it would have worked with singular injustice upon litigants in the Federal Circuit Courts; for, while an appeal to the Supreme Court from a State Court decision was only possible in a case where the latter had held a State law constitutional, an appeal from a Circuit Court decision was possible, even if that Court

held the State law invalid. An appellant in the Supreme Court in the latter case would find himself in this predicament: if five out of seven Judges concurred in finding the State law invalid, he would lose his appeal; and if only four concurred, the proposed statute would prohibit the Supreme Court from finding the law invalid; hence the decision of the Circuit Court as to invalidity would become final; so that the appellant would lose in either case, and the proposed statute would be of no avail to him. But the fundamental objection to the proposition was that it completely ignored the true function of a judicial tribunal, which was, to hold the scales of justice even and to decide impartially between the parties, the appellant and the appellee both meeting before it on even terms. The proposed statute entirely lost sight of the fact that suits in the Supreme Court involving the validity of State statutes were litigation between individuals and presented questions of the property or personal rights of individuals, and that each litigant was entitled to equal protection. These suits were not impersonal attempts to adjudicate between the Constitution, or the Federal Government, and the State; they were simply adjustment of the respective rights of two persons, one claiming a right under the Constitution, the other under the State law. A Federal statute, therefore, which required an appellant to persuade five out of seven Judges, in order to win, while the appellee in order to prevail had to persuade but three Judges, gave to the appellee in a lawsuit very heavy odds. The parties no longer came into the Court on an equal basis, but with the chances heavily weighted against an appellant—and this was not in consonance with any Anglo-Saxon system of justice."

Thus any court that has jurisdiction to hear, but is unable, except in form, to decide a particular case unless six-sevenths of its membership concur, is not "open to every person," and is unable "to administer justice without denial or delay by due course of law."

Manifestly, too, this restriction upon the Ohio Supreme Court gives to those who there seek to have a law held constitutional, after the Court of Appeals has held it unconstitutional, an advantage over those seeking to procure the reversal of a decision of the Court of Appeals holding a law constitutional; the effect being that in one case the party is defeated unless all but one member of the Supreme Court concur in sustaining his contention, while in the other a majority controls and he prevails. When parties are unable to approach a court upon an equality, equal protection of the laws is manifestly denied to them. It may be unnecessary that any such right of review in the Supreme Court of Ohio should be provided at all so far as the Federal Constitution is concerned. But having been provided by the Constitution of that State as a matter of right in all cases involving constitutional questions, it must be accorded impartially so as to afford the equal protection of equal laws not in form only, but in substance and in fact, and always. In various pronouncements, the judges of that Court are all committed to the proposition that this restriction operates in practice directly contrary to these principles, both upon litigants and upon the laws. The Court erred in not holding accordingly that it contravenes the Equality clause and is hence of no effect.

Judged thus, as it must be, by the actual results of its operation, and viewed in any aspect and from every standpoint, this clause of Section 2 of Article IV of the Constitution of Ohio, rests upon an irrational basis of attempted classification, is repugnant to those provisions of the Federal Constitution which are now invoked to render it inoperative, and is therefore null and void.

In *Green v. Red Cross Medical Service Company*, 232 Ill. 616, at page 619, the opinion of the court, by Cartwright, *J.*, declares:

"We are asked to review the finding of the Appellate Court as to the fact found and incorporated in the judgment of that court by virtue of the provision of section 120 of the Practice Act, which provides that if the Appellate Court shall reverse a judgment of the trial court as the result of finding the facts different from the finding of the trial court, and does not remand the cause, both the facts and law shall stand for review in this court. We have held that provision to be a violation of the constitution, as conferring upon one party to a litigation a special privilege not enjoyed by the other party, and as denying to the party whose rights are limited on the appeal, and who has no right to have the facts reviewed in case they are held against him by the Appellate Court, the equal protection of the laws. *Hecker v. Illinois Central Railroad Co.*, 231 Ill. 574; *Jones v. Chicago, Rock Island and Pacific Railroad Co.*, id. 302."

In the *(Jones)* case last cited, the holding therein is distinguished at p. 319 from that in *Chicago and Alton Railroad Co. v. Fisher*, 141 Ill. 614, where it was "decided that the legislature might properly determine in what class of cases the judgment of the Appellate Court should be final, excepting, of course, the four classes of cases in which an appeal from the Appellate Court to this Court is guaranteed by the constitution."

And in the other *(Hecker)* case, it is held (syl. 3):

"The legislature has power to regulate appeals and writs of error, but it has no right to discriminate between the parties and allow an appeal to one party from an adverse decision and not allow it *upon equal terms* to the other." (Italics ours)

The scope of the doctrine of classification is also discussed at pp. 578-9, with citations of illustrative decisions from different jurisdictions, including *Sanitary District v. Bernstein*, 175 Ill. 215, where the court said:

"Every citizen has an equal right with every other to resort to the courts of justice for the settle-

ment and enforcement of his rights, and it is true that a discrimination between different classes of litigants which is merely arbitrary in its nature is a denial of that right and of the equal protection of the law."

See also:

Funkhouser v. Randolph, 287 Ill. 94;
Arizona Eastern R. R. Co. v. Head, 26 Ariz. 259, syl. 4;
Clapp v. Ely, 27 N. J. L. 555, 620-1, 622-4.

2. The Ohio Park Board Law, General Code Sections 2976-1 to 2976-10i, is repugnant to the Due Process and Equal Protection clauses of the XIV Amendment, Sec. 1, and to the guaranty concerning state government in Sec. 4, Article IV of the Federal Constitution,—

(A) *in delegating the legislative power to the probate judge of a county (a) to create upon the application of self-constituted petitioners, a park district on finding it "conducive to the general welfare"; (b) to mold its boundaries at his (limited) discretion; (c) to create a board of three park commissioners, with no limitation as to citizenship, residence, or other qualification, and deriving their office from his appointment and not by election, for the exercise at their discretion of important powers of government within and beyond such district; and (d) to create, on further petitions, by subsequent annexations, an indefinite expansion of such district within and beyond the county and through any number of counties,—jurisdiction for the latter purpose, when found to be "conducive to the general welfare," being in the probate judge of the county in which such annexed territory lies;*

(B) *in delegating to such non-elected park commissioners the legislative power (a) to define misdemeanors within and adjacent to such district, and within and adjacent to any territory acquired outside thereof, and to*

clothe their agents with power to make arrests in all such places; (b) to levy, at discretion within a maximum limit, upon all personal and real property within such district, general taxes, which in no sense purport to be imposed or apportioned according to benefits; (c) to acquire lands without as well as within such district; (d) to exercise therefor the power of eminent domain; (e) to visit the cost of acquiring lands without such district upon the taxpayers within it; and (f) to expend tax revenues for acquiring lands at discretion, and for so developing, improving and protecting them "as they may deem conducive to the general welfare"; and

(C) *in burdening the taxpayers of the district unequally in sundry ways.*

Unlike *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, and other similar decisions of this Court, this suit involves a kind of district which is formed for a public purpose more general and indefinite than the construction and maintenance of one or more local public improvements for the special benefit of the lands or inhabitants of the included areas. The legislature in enacting the Park Board Law defined no fixed or determinate undertaking to be accomplished by the exercise of prescribed powers and through agents clothed with appropriate administrative authority limited to that end. The Law is merely an enabling act—not mandatory but permissive.

The "Conservation" Amendment of 1912 to the Ohio Constitution provides (Art. II, Sec. 36):

> "Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also to pro-

vide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, measuring and marketing coal, oil, gas and all other minerals."

The Park Districts Act provides (G. C. Sec. 2976-1):

"In order to encourage forestry, to provide for converting into forest reserves lands acquired for that purpose and to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, park districts may be created as herein provided. * * *"

The same Act further provides (G. C. Sec. 2976-7):

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. * * *"

The language of the Act thus paraphrases Article II, Section 2 of the State Constitution. The purpose defined in that section is a state purpose—"for converting into forest reserves lands forfeited to the state," the "acquiring of other lands for that purpose," and the "conservation of the natural resources of the state." But the Act in the last clause above quoted goes on to particularize means for realizing the purpose of the conservation section of the Constitution. It is avowedly "to those ends" and "in order to" those purposes that the law is enacted. In Ohio a state purpose must be effected at state expense. The cost of a state institution or state improvement must be defrayed by the state and cannot be laid upon the taxpayers

locally. *Wasson, et al. v. Commissioners,* 49 Ohio St. 622. Therefore in order to sustain the constitutionality of the Park Districts Act, which provides for casting the entire burden of cost upon the taxpayers within the district, the *park* purpose is singled out by the Ohio Supreme Court and likened to that of city parks, so as to make it a proper subject of local taxation and of district government. The park districts created under this act are not, however, in any sense municipal corporations or ancillary thereto; neither are they of that familiar type of special district which is formed at the instance of those whose lands will be benefited for the purpose of making or constructing a particular local improvement such as, for example, an irrigation or a reclamation or a flood control project that is undertaken for the special benefit of the included territory. The design of the Conservation Amendment was not to produce any special enhancement of the value or usefulness of surrounding property through the acquiring by the public of submerged or swamp or forest lands and other natural resources of the state and the developing and preserving of the same as forest or other reserves for the general welfare. Nor does the Park Districts Act provide for special benefit improvements or those which serve a particular local interest or add to the value of included or environing lands. The Act discloses no suggestion of this sort. The taxes authorized to be levied by the Park Commissioners are not required to be based on the cost of a prescribed improvement or project or to be levied at a rate prescribed by the legislature or mathematically resulting from criteria prescribed by it. Neither do they purport to be special assessments laid according to actual or presumed benefits. The Act does not admit of any such construction.

We have then the case of a taxing district, the formation of which and the exercise of powers granted to its

commissioners are conditioned upon findings, not made by the legislature but required by it to be made by others, upon the question whether such actions will be "conducive to the general welfare."

Without here attempting to gainsay that this Court, on appeal from a state court of last resort, will not review the decision of any issue which the latter tribunal by its judgment has made to turn upon the law of such state as an independent ground adequate to sustain such judgment, and without now disputing that the Federal Constitution does not forbid the states to delegate their legislative power if thereby the rights of individuals guaranteed by that instrument are not thereby infringed—an "if" that begs the question—there yet remains for the decision of this Court the question *inter alia* whether the Park Districts Act embodies such a delegation of legislative power as to invade the rights so guaranteed.

Returning now to the scrutiny of the Act itself, it will be observed that no duties are enjoined upon the Park Board Commissioners. They may remain entirely inactive. If, however, they choose to act, the field of action is so inclusive that their discretion may properly be said to be limited only by their revenues. And for raising revenue, their discretionary power of general taxation in this populous Park District is very large. They may acquire lands where they please, within or without the district, and may improve them as they think fit. They are really answerable to no one. True, the probate court may, on hearing, remove and replace them, or, on expiration of their terms, appoint others. But he cannot instruct or compel them to pursue any policy or to accomplish any purpose. And once created, the district lives on forever. The probate judge is obliged to create a district on proper petition, provided only he finds its creation will be "conducive to the general welfare." The commissioners, when appointed by

him, may acquire lands, and thereupon they may "develop, improve and protect them as they may deem conducive to to the general welfare."

But the determination of what is "conducive to the general welfare," is clearly a legislative function. The General Assembly of Ohio has thus abdicated its office and function *pro tanto* by delegating to the probate judge and to his appointees the determination of these questions of purely legislative policy. Five of the seven judges of the Supreme Court of Ohio have said in this case that the Park Board Law is unconstitutional. Can it be properly objected that this Court has not the jurisdiction to correct a state's form of government?

The answer is two-fold; first, as the Act was charged to be repugnant to both State and Federal Constitutions, it will be presumed that the five judges deemed it unconstitutional as to both; secondly, that this appellant, suing as she has the right and authority to do in the name of the State of Ohio on her relation as a taxpayer, invokes the guaranty in U. S. Constitution, Section 4, Article IV, of a republican form of government for that state, since its governmental power is being otherwise exercised upon her as such taxpayer. True, this Court has perhaps never answered the first branch of the query, which the opinion in *Michigan Central Railroad Company v. Powers,* 201 U. S. 245, propounds, viz.:

> "Suppose a State by its constitution grants legislative functions to the executive or to the judiciary, what provision of the Federal Constitution will nullify the action? Will the grant work an abandonment of a republican form of government, or be a denial of due process or equal protection?"

Precisely these results, however, do follow upon the more searching point now pressed. Here the offense comes,

not indeed by any grant in the constitution of a state, but by act of its legislature delegating to probate judges its law-making functions of forming park districts if and when they find them "conducive to the general welfare," and delegating to park commissioners appointed by such judges its legislative power to find generally what they shall do that will be "conducive to the general welfare," and specifically conferring upon them the powers to fix tax rates and make levies, to appropriate lands, to frame penal laws, and to create a constabulary. It is surely not a judicial function to determine whether "the creation of such district will be conducive of the general welfare" and to hinge the erection of a new kind of political subdivision of the state upon such finding (G. C. Sec. 2976-4). Nor at least to *appointed* commissioners of such district can *discretion* be lawfully granted to create a policy and program for such district, to take property by eminent domain, to tax those who do not consent to be taxed, and to inculpate and arrest offenders against the edicts of such non-elective board. Security of persons and property from political invasion of the fundamental rights pertaining thereto is the essence of republican government, of due process, and of equal protection of the laws. The power to define what is conducive to the general welfare, the power to appropriate, the power to tax, and the power to define punishable offenses, belong exclusively to the legislative branch of the government—to the general assembly or (by the initiative and referendum) the suffrage of the state; or, where such powers as that of local taxation are vested in subdivisions of the state, to the people thereof or their elected representatives, as in municipal corporations, counties and townships, and other similar districts created in Ohio for special purposes, as well as school districts. Assessments according to benefits are distinguishable and may, of course, be laid according to rules prescribed by

law. But in levying general taxes or defining any legislative policy, the responsibility of those who thus exercise power to those on whom it is exercised, constitutes, through the employment of the elective franchise, the only effective guaranty against the abuse of such power.

It is not contended that, so far as the Federal Constitution is concerned, a state may not clothe administrative officers with power to make and enforce regulations (and perhaps even to raise revenues by taxation) in so far as may be necessary and convenient to accomplish objects specifically defined and required by its laws; as where a statute prescribes an automatic mode of determining the rate of tax which it commands to be levied. But it is contended that, to accomplish undefined and permissive purposes or ends, a state may not empower its non-elected agents to determine what vague policies are "conducive to the general welfare," and when they are so determined to pursue them by such discretionary administrative means. If a state undertakes to govern in that manner, its taxpayers or citizens subjected to such form of rule, may surely invoke in its and their behalf the protection and guaranty of Section 4 of Article IV.

The power of taxation is peculiarly and pre-eminently a legislative power, and one which the legislature cannot delegate, except by specific authority conferred upon it by the Constitution. *Cincinnati v. Roettinger*, 105 O. S. 145, 154; *C. W. & Z. Ry. v. Commissioners*, 1 O. S. 77, 87, opinion by Ranney, *J.*

"The power to vote taxes or assessments must rest in the hands of those liable to pay them." *Campbell v. Park*, 32 O. S. 544, 560. "Taxes being a grant of the people who are taxed, the grant should be made by the immediate representatives of the people." *State v. Toledo*, 48 O. S. 112, 131, 132, 133-4. "The power to tax is one of the highest attributes of sovereignty. * * * Being a sovereign

power, it can only be exercised by the General Assembly, when delegated by the people in the fundamental law." *Mays v. Cincinnati,* 1 O. S. 269, 273. "The power of taxation is one of the sovereign powers of the state; it can only be exercised through the legislature." *Mechanics etc. Bank v. Debolt,* 1 O. S. 591, 600.

The basic principle of free institutions which forbids the delegation of the taxing power, or vesting it in non-elective boards, is generally applied in the other states of the Union. In *City of Little Rock v. Board of Improvements,* 42 Ark. 152, the peculiar provisions of the state constitution were held to authorize the delegation to and exercise by an appointive board of improvement of a city (a municipal corporation suggests *imperium in imperio*) the power to levy *assessments;* yet the general principle is conceded as follows (p. 160):

> "It is certainly true that the power of taxation is a sovereign power, which as a general rule, must be exercised by the legislature of the state; and, even in the absence of express constitutional prohibitions can not be delegated. The principle is considered to underlie all constitutions, as one of those which are taken for granted in all free governments; and so pervade the constitutions that their expression is not deemed essential."

In *Reelfoot Lake Levee District v. Dawson,* 97 Tenn. 151, 34 L. R. A. 725, the court says at page 732:

> "The particular feature of the act that is most objectionable as a delegation of the taxing power is that in which the levee district is authorized to decide for itself what rate of taxation, if any, shall be laid annually, only the maximum rate being prescribed. The legislature, before passing the law, should have determined at least three things: (1) that the purpose in view was a proper purpose for taxation; (2) the annual rate required for the present; and (3) the

rule under which it should be levied. These matters are within the legislative function, and cannot be delegated, in the absence of express authority of the fundamental law. Such questions may be left to counties and incorporated towns, in respect to their own taxes, and within proper limitations; but that is so because the general assembly is expressly empowered to grant them that authority. No other agency or instrumentality of the government can be given such power."

The following are cases applying this rule to facts not unlike those here involved.

Board of Park Commissioners v. Detroit, 28 Mich. 228;
Vallelly v. Board of Park Commissioners, 16 N. D. 25;
Parks v. Board of Commissioners, 61 Fed. 436;
Waterhouse v. Public School, 8 Heisk, 857;
State ex rel. Howe v. Des Moines, 103 Ia. 76;
Schultes v. Eberley, 82 Ala. 242;
State of Montana, ex rel., v. Edwards, 42 Mont. 135.

Citations of like sort could be extended indefinitely. For example, *The Inhabitants of the Township of Barnards v. Allen,* 61 N. J. L. 228, at pages 230, *et seq.,* is a case where the right of taxation is exhaustively considered and traced historically through the long struggle in England to our own birth of freedom. And see also:

Gautier v. Ditmar, 204 N. Y. 20, 26;
State (Lydecker) v. Drainage etc. Commissioners, 41 N. J. L. 154, 156-7.

The delegation of other legislative powers in the formation of special tax districts is condemned, and a statute so offending was held void in the decision (cited also in *Truax v. Corrigan,* to the other point in this case) of *Funkhouser, et al. v. Randolph, et al.,* 287 Ill. 94.

The following are extracts from pages 104 and 105 of the opinion:

> " 'If, after being sufficiently advised and informed in the premises, the court finds that Little Wabash River Drainage District *should be* organized for the purpose of improving said river', (a purely legislative question,) it shall be so ordered, and said findings and judgment are to be final and not questioned in any collateral proceeding."
>
> "What ought to be the boundaries of a special drainage district or what lands ought or should be organized into such a drainage district for drainage purposes is a legislative question and one that cannot be legally determined by a court."
>
> "Unilateral restrictions of this character on the right of review are repugnant to the constitutional provisions guaranteeing every person equal protection of the law. Every citizen has a right, under such guaranties, to insist that his rights of life, liberty and property shall be determined by the same rules which settle and determine similar rights of others."
>
> "The act is void for another reason. It fails to provide for the election of the corporate authorities of such district or their appointment in some mode to which the people of the district have given their assent."

The judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

George D. Hile,

Snyder, Henry, Thomsen, Ford & Seagrave,

By Frederick A. Henry,

Attorneys for Appellant.

APPENDIX A.

107 Ohio Laws, Page 65.

AN ACT

To provide for the conservation of natural resources by the creation, development and improvement of park districts, and to repeal sections 2976-1, 2976-2, 2976-3, 2976-4, 2976-5, 2976-6, 2976-7, 2976-8, 2976-9 and 2976-10 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

[*Park districts may be created; boundaries thereof.*]

SECTION 1. [*Section 2976-1.*] In order to provide for the preservation of natural resources, park districts may be created as herein provided. Such park districts may include all or a part only of the territory within any county, and the boundaries thereof shall be so drawn as not to divide any existing township or municipality within such county.

[*Application to probate judge; contents.*]

SECTION 2. [*Section 2976-2.*] Application for the creation of such park districts shall be made to the probate judge of the county within which the district is to be located. Such application shall either be signed by a majority of the resident electors residing within the proposed district as determined by the number of electors voting at the last preceding general election within such territory, or, in lieu thereof, shall be authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district. Such application shall state the name of the proposed district, shall contain an accurate description of the territory to be included, and shall be accompanied with an accurate map or plat thereof.

[*Time of hearing; notice by publication.*]

SECTION 3. [*Section 2976-3.*] Upon the filing of such application the probate judge shall fix a time for the hearing of such application which shall not be less than twenty or more than forty days subsequent to the date of the filing of the application, and shall cause notice of the filing of

such application and the date of hearing thereof to be published in two newspapers of general circulation within such district, if such there be; otherwise such notice shall be published in one newspaper, and if there is no newspaper of general circulation within such proposed district, then he shall cause such notice to be posted in five of the most public places within such proposed district. Such notice shall be published, or posted, for a period of not less than fifteen days prior to the date fixed for the hearing. The hearing may be adjourned from time to time upon good cause shown.

[*Evidence, argument, judgment. Territorial limits may be changed at hearing.*]

SECTION 4. [*Section 2976-4.*] At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application. The probate judge shall have the power to amend or change the limits of the territory described in the petition at the time of the hearing upon the same, provided, that in no case shall he increase the limits or size of said district, and provided further, that in case any of the original territory be eliminated from the district as finally established, that the boundary lines of the district as finally ordered by the court shall not divide any existing township or municipality.

[*Appointment of commissioners; term, oath, bond.*]

SECTION 5. [*Section 2976-5.*] Upon the creation of such district the probate judge shall appoint three commissioners, who shall take office immediately and whose respective terms shall expire one, two and three years, respectively, from the first day of January next after the date of their appointment, and thereafter their successors shall be appointed by such probate judge for terms of three years. Before entering upon the performance of his duties, each commissioner shall take an oath to faithfully perform

the duties of his office, and shall give bond for the faithful performance of the duties of his office in the sum of five thousand dollars. Such bond shall be approved by and filed in the office of the county auditor. Such commissioners shall serve without compensation, but shall be allowed their actual and necessary expenses incurred in the performance of their duties.

[*Board a body corporate; employment of secretary; records.*]

SECTION 6. [*Section 2976-6.*] Such commissioners shall constitute the board of park commissioners of such district, and such board shall be a body politic and corporate, and shall be capable of suing and of being sued as in this act provided. Such board may employ a secretary and such other employees as may be necessary in the performance of the powers herein conferred, and shall keep an accurate and permanent record of all its proceedings.

[*Powers and duties of board. Appropriation proceedings, how instituted.*]

SECTION 7. [*Section 2976-7.*] Such board shall have power to acquire lands within such district for the conservation of the natural resources of such district, and to that end may create parkways, parks and other reservations of land, and develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation. In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided for the appropriation of private property by municipal corporations insofar as such proceedings are applicable. Either the fee or a lesser interest in the lands may be acquired, as the board may deem advisable.

[*Agreement with other public authorities in control and improvement.*]

SECTION 8. [*Section 2976-8.*] Said board may also, by agreement with the council or other public authority in control of parks or park lands within any municipality in the

district, assume control of all or a portion of any existing parks or park lands within such municipality; and in such event, such parks or park lands may be developed, improved and protected as in case of lands otherwise acquired by said board; provided, however, that nothing herein shall authorize said board to acquire or control any park, park lands, parkways, play grounds, other lands or boulevards owned or controlled by any other public authority except by agreement as above provided.

[*Cost of improvement, how assessed and collected.*]

SECTION 9. [*Section 2976-9.*] In the development and improvement of the lands acquired by the board, such board may assess such portion of the cost of such development or improvement as it may deem equitable, not, however, in excess of fifty per cent of such total cost, upon abutting, contiguous, adjacent or otherwise specially benefited lands, in an amount not in excess of and in proportion to the special benefits conferred upon such lands by such development or improvement. Such assessments shall be payable in not to exceed ten equal annual installments, and said board may borrow money in anticipation of the collection of such special assessments, and the proceedings had in the levying and collection of such special assessments, including the issue of bonds of such district in anticipation of the collection of deferred assessments, shall be as provided in case of the levy and assessment of special assessments for street improvements in municipalities, in so far as such proceedings shall be applicable.

[*Tax levy; power to borrow in anticipation of collection.*]

SECTION 10. [*Section 2976-10.*] Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. After the budget commission of the county in which said district is located shall certify such levy, or such modification thereof as they deem advisable to the county auditor, it shall be by him placed upon the tax duplicate,

and the board may then borrow money in anticipation of the collection of such tax, and issue the negotiable notes of such board therefor in an amount not in excess of seventy-five per cent of the proceeds of such tax, based upon the amount of the current tax duplicate. Such notes shall not be issued for a period longer than one year, and shall be payable out of the proceeds of such levy, and to the extent of such notes and the interest which may accrue thereon, such levy shall be exclusively appropriated to the payment of such notes, and shall be used for no other purpose whatsoever. Any portion of such notes remaining unpaid through any deficiency in such levy, shall be payable out of the next ensuing levy, which shall be made by said board in the next ensuing year in an amount at least sufficient to provide for the payment of said notes, not, however, in excess of one-tenth of one mill.

[*Unexpended balances transferred and available; books, records, surveys, etc.*]

SECTION 11. [*Section 2976-10a.*] All unexpended balances of funds heretofore levied, or collected, under the provisions of section 2976-4 of the General Code, shall be transferred to the credit of, and shall be available for expenditure by, the board herein provided for, to the extent that such funds shall have been collected from territory included within such park district. Any balance of such fund not so collected, shall be transferred to the general fund of the county. All records, surveys and other property or information acquired pursuant to the provisions of section 2976-2 to section 2976-10 of the General Code shall also be delivered to, and become the property of said board, to the extent that they relate to lands within such district. If such records, surveys, other property and information were acquired with funds produced in part from tax levies upon property located outside said district, the amount of such funds shall be ascertained and paid by said board into the county treasury to the credit of the general fund of the county.

[*Funds shall be kept in depositories; county treasurer and auditor ex-oficio officers; duties.*]

SECTION 12. [*Section 2976-10b.*] All funds under the control of said board shall be kept in depositories selected in the manner provided for the deposit of county funds, insofar as such proceedings are applicable, and such deposits shall be secured as provided in case of county funds. The treasurer of the county wherein said district is located shall be the custodian of the funds of the board and shall be an ex-officio officer of said board. He shall pay the said funds out upon the warrant of the auditor of the county wherein said district is located. The auditor of the county in which said district is located shall be an ex-officio officer of the board and no contract of said board involving the expenditure of money, shall become effective until the auditor certifies that there are funds of said board in the county treasury and otherwise unappropriated, sufficient to provide therefor. The auditor shall issue warrants to the treasurer to disburse the funds of the board upon order of the board, evidenced by the certificate of the secretary in such manner as the bureau of uniform accounting may prescribe. The accounts of said board shall also be kept in the manner to be prescribed by said bureau.

[*Removal of commissioners; procedure; vacancy.*]

SECTION 13. [*Section 2976-10c.*] Each of said commissioners shall be subject to removal at the discretion of the probate judge, either upon complaint filed with such judge, or upon his own motion No such removal shall be made, however, without giving such commissioner not less than ten days' notice and a full opportunity to be heard in his own behalf, which hearing shall be public. The order removing such commissioner shall state the reasons therefor and shall be entered upon the records of the probate court. In case of such removal, or in case of other vacancy in the office of commissioner, the vacancy shall be filled by the probate judge by appointment for the unexpired term.

[*Repeals.*]

SECTION 14. Sections 2976-1, 2976-2, 2976-3, 2976-4, 2976-5, 2976-6, 2976-7, 2976-8, 2976-9 and 2976-10 of the General Code be and the same are hereby repealed.

E. J. HOPPLE,
Speaker of the House of Representatives.

EARL D. BLOOM,
President of the Senate.

Passed March 6, 1917.

The attached bill was presented to the Governor on March 7, 1917, and was not signed or returned to the house of origin within ten days after said bill was so presented, exclusive of Sundays and the day said bill was presented, and was filed in the office of the Secretary of State March 27th, 1917.

PRICE RUSSELL,
Veto Clerk.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 27th day of March, A. D. 1917.

27G.

108 Ohio Laws, Part 2, Page 1097.

AN ACT

To amend sections 2976-1 and 2976-7 of the General Code and to supplement section 2976-10c of the General Code by the enactment of sections 2976-10d, 2976-10e, 2976-10f, 2976-10g, 2976-10h and 2976-10i relating to park districts and providing for the annexation of territory thereto, for the sale of lands for the levying of taxes, for the issue of bonds and conferring certain police powers upon boards of park commissioners.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2976-1 and 2976-7 of the General Code be amended to read as follows, and that section 2976-10c be supplemented by the enactment of sections 2976-10d, 2976-10e, 2976-10f, 2976-10g, 2976-10h and 2976-10i as follows:

[*Park districts may be created to encourage forestry, etc.*]

Sec. 2976-1. In order to encourage forestry to provide for converting into forest reserves lands acquired for that purpose and to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, park districts may be created as herein provided. Such park districts may include all or a part only of the territory within a county, and the boundary lines thereof shall be so drawn as not to divide any existing township or municipality within such county.

[*Acquisition of addition of lands, lakes, streams, etc.*]

Sec. 2976-7. Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, pathways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation.

[*Appropriation proceedings.*]

In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided for the appropriation of private property by municipal corporations in so far as such proceedings are applicable. Either the fee or any lesser interest may be acquired as the board may deem advisable and the provisions of this section shall apply to districts heretofore created.

[*Annexation of adjacent or contiguous territory; procedure.*]

Sec. 2976-10d. When conducive to the general welfare any territory adjacent and contiguous to an existing park district, whether located within or without the county in which such district was created, may be annexed to such park district as follows. Upon the filing with the board of park commissioners of a petition requesting such annexation, containing an accurate description of the territory proposed to be annexed, accompanied by an accurate map or plat of such territory, and signed either by a majority of the electors residing within such territory or by not less than fifty such electors, the board of park commissioners shall determine whether they deem it advisable that such annexation should be made. If they determine in favor of such annexation, they shall make application to the probate court of the county in which such territory is located, setting forth the fact of the filing of such petition and the reasons why it is advisable that such territory should be annexed to such park district. Any such board may of its motion file such petition in such probate court. Upon the filing of such petition, like proceedings shall be had as are provided in sections 2976-3 and 2976-4 of the General Code upon application for the creation of a park district, except that the territory so annexed may include a part only of an existing township or municipality.

[*Powers of budget commissioners in relation to districts.*]

Sec. 2976-10e. In the event of the annexation to a park district of territory located in a county other than the

county in which such district was created, the budget commissioners of the county in which such annexed territory is located shall exercise, with reference to such annexed territory, the powers conferred upon budget commissioners by section 2976-10 of the General Code, and the auditor and treasurer of the county in which such annexed territory is located shall exercise, with reference to taxes levied and collected by the park board upon such annexed territory, the powers conferred upon county auditors and county treasurers by section 2976-10b of the General Code.

[*Sale or lease of lands not needed; notice.*]

Sec. 2976-10f. If the board of park commissioners shall find that any lands which they have acquired are not necessary for the purposes for which they were acquired by such board, they may sell and dispose of such lands upon such terms and conditions as they may deem advisable, and may also lease or permit the use of any lands for purposes not inconsistent with the purposes for which such lands were acquired, and upon such terms and conditions as they may deem advisable. Provided, however, that no lands shall be sold without first giving notice by publication once a week for four consecutive weeks in not less than two English newspapers of general circulation in such district of their intention to sell such lands. Such notice shall contain an accurate description of the lands in question and shall state the time and place at which sealed bids will be received for the purchase thereof and such lands shall not thereafter be sold at private sale for less than the best and highest bid so received without giving further notice as herein specified.

[*Approval of probate court.*]

Provided, however, that no such lands shall be sold at either public or private sale without the approval of the probate court of the county in which such lands are situated.

[*By-laws, rules and regulations; violation of, a misdemeanor; penalty.*]

Sec. 2976-10g. The board of park commissioners shall have power to adopt such by-laws, rules and regulations as they may deem advisable for the preservation of good order within and adjacent to such parks and reservations of

land under their jurisdiction and control, and of property and natural life therein, and such by-laws, rules and regulations shall be published as provided in case of ordinances of municipal corporations before taking effect. Whoever, violates any such by-laws, rules or regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in any sum not exceeding one hundred dollars ($100) for the first offense and not exceeding five hundred dollars ($500) for a second or further offense. All fines collected for any such violation shall be paid into the treasury of such park board.

[*Powers of employes; oath.*]

Sec. 2976-10h. Such employes as the board of park commissioners may designate for that purpose shall have and may exercise all the powers of police officers within and adjacent to the lands under the jurisdiction and control of such board. Provided, however, that before exercising such powers, such employes shall take oath, and give bond to the state of Ohio in such sum as the board shall prescribe, for the proper performance of their duties in such respect.

[*Tax levy for use of district; submission of question.*]
[*Issue of bonds.*]

Sec. 2976-10i. Upon or before the first day of September in any year the board of park commissioners, by resolution, may submit to the electors of the district the question of levying taxes for the use of the district. Such resolution shall declare the necessity of levying such taxes, shall specify the purpose for which such taxes shall be used, the annual rate proposed, and the number of consecutive years such rate shall be levied; and such resolution shall be forthwith certified to the board of deputy state supervisors and inspectors of elections in each county in which any part of of such district is located, and the question of the levy of taxes as provided in such resolution shall be submitted to the electors of the district at the next ensuing general election. The ballot shall set forth the purpose for which said taxes shall be levied, the annual rate of levy, and the number of years of such levy. If a majority of the electors voting upon the question of such levy shall vote in favor thereof, such taxes shall be levied and shall be in addition

to the taxes authorized by section 2976-10 of the General Code, and all other taxes authorized by law; provided that the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. When a tax levy shall have been authorized as herein provided, the board of park commissioners may issue bonds in anticipation of the collection of such levy, provided that such bonds shall be issued only for the purpose of acquiring and improving lands; and such levy, when collected, shall be applied in payment of the bonds so issued and the interest thereon; provided further that the amount of bonds so issued and outstanding at any time shall not exceed one per cent. of the total tax valuation in such district. Such bonds shall bear interest at a rate not to exceed six per cent. per annum, shall be signed by a majority of the members of such park board, and shall be sold in the manner specified by law for the sale of municipal bonds, except that before advertising such bonds for sale at public sale, it shall be necessary only to offer said bonds for sale to the industrial commission of Ohio as provided by law.

SECTION 2. That said original sections 2976-1 and 2976-7 of the General Code be, and the same are hereby repealed.

CARL R. KIMBALL,
Speaker of the House of Representatives.

CLARENCE J. BROWN,
President of the Senate.

Passed April 9, 1919.

Passed in the house of representatives notwithstanding the objections of the Governor, January 15, 1920.

CARL R. KIMBALL,
Speaker of the House of Representatives.

Passed in the senate notwithstanding the objections of the Governor, January 15, 1920.

CLARENCE J. BROWN,
President of the Senate.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 16th day of January, A. D. 1920.

253 G.